Kasowitz Benson Torres LLP v Bath Club Entertainment, LLC
2025 NY Slip Op 33397(U)
September 9, 2025
Supreme Court, New York County
Docket Number: Index No. 655541/2024
Judge: Mary V. Rosado

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

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KASOWITZ BENSON TORRES LLP

Plaintiff,

- v -

BATH CLUB ENTERTAINMENT, LLC,

Defendant.

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INDEX NO. 655541/2024

MOTION DATE 01/10/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, and after a final submission date of June 2, 2025, Plaintiff Kasowitz Benson Torres LLP's ("Plaintiff") motion for summary judgment against Defendant Bath Club Entertainment, LLC ("Defendant") is granted in part and otherwise denied without prejudice with leave to renew after further discovery.

I. Background

In a written agreement dated April 26, 2023, Defendant retained Plaintiff to provide legal services related to ongoing legal disputes with several non-party entities. The parties modified the retainer agreement on August 29, 2023 to expand the scope of representation while simultaneously providing Defendant with a discount on Plaintiff's hourly fees. The terms of the retainer agreement were modified again on March 18, 2024, with Defendant being granted an even greater discount on Plaintiff's fees in exchange for a 20% contingency fee on any recovery obtained by Plaintiff in ongoing legal proceedings. According to Plaintiff, Defendant failed to pay any of its legal fees aside from a $50,000 retainer provided in July of 2023. On October 18, 2024, Plaintiff commenced this action against Defendant, alleging breach of contract, quantum meruit, and account stated

seeking a judgment for $519,617.45. Defendant filed its Answer on December 17, 2024, and shortly thereafter, on January 10, 2025, Plaintiff filed the instant motion for summary judgment.

Defendant opposes the motion, and through the affirmation of R. Donahue Peebles, Defendant's managing member, provides a conflicting narrative of events. According to Mr. Peebles, Defendant negotiated the March 18, 2024 agreement with two former Kasowitz attorneys, Ms. Recine and Mr. Kupfer. However, on April 2, 2024, Ms. Recine and Mr. Kupfer joined the law firm of King & Spalding. Although Defendant considered transferring its legal file to King & Spalding, it maintained its relationship with Plaintiff. According to Mr. Peebles, in April 2024, as inducement for retaining Defendant's business, Plaintiff promised it would honor the March 18, 2024 modified retainer agreement. Yet, according to Mr. Peebles, on May 13, 2024 Plaintiff informed Defendant that the March 18, 2024 agreement was not economically viable for Plaintiff and needed to be renegotiated. According to Defendant, this constituted an anticipatory breach of the March 18, 2024 agreement.

Shortly thereafter Mr. Peebles claims he issued a stop-work order to Plaintiff. On June 5, 2024, Defendant requested its litigation files be transferred to King & Spalding. Mr. Peebles claims he received invoices but objected to them, claiming they included thousands of dollars of bills for work performed after Defendant issued a stop work order. For the reasons that follow, the Court finds Plaintiff is entitled to summary judgment on the issue of liability with respect to its breach of contract claim. However, the motion is otherwise denied without prejudice, with leave to renew upon further discovery.

II. Discussion

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v*

Restani Const. Corp., 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial (*See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). To show entitlement to summary judgment on a breach of contract claim, a movant must prove the existence of a contract, performance, defendant's breach, and damages (see *Markov v Katt*, 176 AD3d 401, 402 [1st Dept 2019]).

Here, no party disputes the existence and validity of the March 18, 2024 revised retainer agreement. Nor does Defendant genuinely dispute Plaintiff performed as Plaintiff provided Defendant with months of legal services. Plaintiff established Defendant's breach by showing Defendant only paid an initial $50,000 retainer in July of 2023 and made no further payments. This was despite Defendant agreeing in the March 18, 2024 agreement that:

> "Bills are rendered on a monthly basis and are payable on receipt. As an accommodation, at [Defendant's] election, [Defendant] shall only be required to pay $50,000 per month towards the Fees that are then due and owing (the "Fees Election"). All fees that are incurred above $50,000 shall roll-over to the next month and shall continue to accrue and remain outstanding until paid. If [Defendant] makes this Election, [Defendant] shall be required to pay $50,000 every month from the time you make the Election, even when no Fees are outstanding, until [Plaintiff's] representation of [Defendant] is complete and all outstanding Fees are paid." (NYSCEF Doc. 11).

That Defendant failed to pay at least some outstanding balance is undisputed. In e-mail correspondence from Defendant's general counsel to Plaintiff dated August 20, 2024, Defendant concedes that there is at least $136,584.00 in outstanding legal fees which it has not paid (NYSCEF Doc. 15). Thus, by Defendant's own admission, it breached the March 18, 2024, agreement. As

Plaintiff has satisfied its *prima facie* burden of demonstrating Defendant's breach of the March 18, 2024 revised retainer agreement, the burden shifts to Defendant to raise a triable issue of fact.

In opposition, Defendant fails to raise a triable issue of fact as to its liability to Plaintiff for breach of contract. Although Defendant raises the issue of anticipatory breach, this doctrine is inapplicable to the facts of the case at bar. Anticipatory breach only occurs before the performance of the allegedly breaching party is due (*Norcon Power Partners v Niagara Mohawk Power Corp.*, 92 NY2d 458 [1998]; *see also Kaplan v Madison Park Group Owners,* LLC, 94 AD3d 616, 618-19 [1st Dept 2012]). At the time Defendant claims its performance was excused due to Plaintiff's alleged repudiation, Plaintiff had already provided Defendant with months of unpaid legal services, making the doctrine of anticipatory breach inapplicable. Moreover, it is well established that a party that has already materially breached the terms of an agreement cannot then avail itself of the doctrines of repudiation and anticipatory breach (*Audthan LLC v Nick & Duke, LLC*, 211 AD3d 419, 421 [1st Dept 2022]). When Plaintiff notified Defendant on May 13, 2024 that it sought to renegotiate the terms of the March 18, 2024 revised retainer agreement, Defendant was already in breach for failure to pay outstanding legal fees or the agreed to $50,000 monthly retainer. Thus, Defendant's anticipatory breach argument is insufficient to defeat summary judgment.

Nor is there any need for discovery on the issue of liability with respect to this relatively straight forward breach of contract fee dispute. Defendant claims it needs to depose Marc Kasowitz, Esq. regarding his efforts to keep Defendant's business and subsequent repudiation of the March 18, 2024 revised retainer agreement. But the issue of repudiation is irrelevant to Defendant's liability, and the terms of the March 18, 2024 revised retainer agreement are not ambiguous, so there is no need for discovery into Plaintiff's internal communications to ascertain

its interpretation of the March 18, 2024 revised retainer agreement.[1] Nor is there any need for discovery from Ms. Recine and Mr. Kupfer who, as Defendant's current counsel in the underlying litigation which is the subject of this fee dispute, could have provided that information to Defendant so they could oppose this motion for summary judgment. Thus, Defendant has failed to raise a triable issue of fact as to its liability to Plaintiff for breach of the March 18, 2024 revised retainer agreement. Therefore, Plaintiff's motion is granted on the issue of liability with respect to its cause of action for breach of contract.

However, on the issue of damages, Plaintiff's motion is denied, without prejudice, with leave to renew upon further discovery. There is conflicting sworn statements about a purported stop work order given to Plaintiff by Defendant and Defendant claims it was billed for unauthorized services. Given there has not yet been any exchange of discovery, whether any services billed for were unauthorized and therefore non-compensable remains an issue of fact precluding summary judgment in favor of Plaintiff on the issue of damages. After further discovery, Plaintiff may renew its application.

For similar reasons, the Court finds Plaintiff's motion for summary judgment on its account stated claim premature (*see, e.g. Mediant Communications Inc. v Spectrum Pharmaceuticals, Inc.*, 238 AD3d 639, 641 [1st Dept 2025]). The Court finds issues of fact regarding Plaintiff's account stated claim are created by Plaintiff's own submissions, which include multiple revised retainer agreements changing payment rates and structure shortly after invoices are issued. Thus, there remains an issue of fact as to whether Defendant implicitly accepted the invoices sent to it or tried to negotiate the invoices as evidenced by the multiple revised retainer agreements. Thus, the

[1] Defendant claims prior issued invoices were supposed to be revised to reflect a 40% discount, but nowhere in the March 18, 2024 agreement is this mentioned. Nor has Defendant produced any written communications at the time of negotiation showing that this was the parties' intent.

motion for summary judgment on the account stated cause of action is denied, without prejudice, with leave to renew upon further discovery.

Finally, because Plaintiff is granted summary judgment on the issue of liability with respect to its breach of contract claim, the branch of the motion which seeks summary judgment on its quantum meruit claim is denied (*see, e.g. Empire State Fuel Corp. v Warbasse-Cogeneration Technologies Partnership, L.P.*, 58 AD3d 534 [1st Dept 2009] [existence of valid contract precludes quantum meruit claim]).

Accordingly, it is hereby,

ORDERED that Plaintiff's motion for summary judgment against Defendant is granted solely to the extent that Plaintiff is granted summary judgment on the issue of liability with respect to its cause of action for breach of contract; and it is further

ORDERED that the branches of Plaintiff's motion for summary judgment on the issue of damages with respect to its breach of contract claim, and on its cause of action alleging account stated, are denied without prejudice with leave to renew upon further discovery; and it is further

ORDERED that Plaintiff's motion for summary judgment on its quantum meruit claim is denied; and it is further

ORDERED that the parties are directed to immediately meet and confer and submit a proposed preliminary conference order to the Court via e-mail to SFC-Part33-Clerk@nycourts.gov, but in no event shall the proposed preliminary conference order be submitted any later than October 22, 2025[2]; and it is further

[2] This date is for the submission of a preliminary conference order only – it is not to appear for a conference. If the parties require a conference to resolve a discovery related issue, they shall notify the Court via e-mail to SFC-Part33-Clerk@nycourts.gov to be scheduled for a conference.

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

9/9/2025
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[x]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ] DENIED	[x]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE